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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. [redacted] 83

GERTRUDE CROMBIE, *Petitioner,*

vs.

HELEN F. CROMBIE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,
First Appellate District

and

BRIEF IN SUPPORT THEREOF

PAUL E. SLOANE,
2 Pine Street,
San Francisco, California 94111,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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In the Supreme Court

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OCTOBER TERM, 1964

No.

GERTRUDE CROMBIE,
Petitioner,

vs.

HELEN F. CROMBIE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California, First Appellate District

The Petition of your Petitioner for a Writ of Certiorari to be directed to the Supreme Court of the State of California to review a judgment of that Court, entered January 13, 1965, which denied without opinion a hearing in that Court of the matter theretofore heard and judgment rendered therein on November 20, 1964, in the District Court of Appeal of said State, wherein Petitioner had thereafter petitioned

for a rehearing thereon, also denied, December 18, 1964, without opinion, all of which decisions were in favor of Respondent and against Petitioner, respectfully shows:

I

ISSUES AND GROUNDS

The Supreme Court, which affirmed the decisions of the District Court of Appeal of California, denied to Petitioner (defendant and appellant in the State Courts), a hearing thereon, also denied thereby to Petitioner due process of law, pursuant to established procedures in said State and in the United States, in that it denied to Petitioner a reasonable opportunity for a hearing in the following matters, and under the surrounding circumstances more fully hereinafter set forth.

(1) It disregarded the failure of Respondent (plaintiff in the state courts) to present the most essential evidence to establish her title, to wit, the introduction into evidence at the trial, of the Group Life Insurance Policy on which the present quieting title action was brought in respect to the ownership of the death benefits payable thereunder, or to set forth any of its terms, beneficiaries, execution date and possible connections with prior, cancelled insurance policies and contracts. This lack of evidence was repeatedly called to the attention of these state courts. The failure of said courts to give Petitioner any notice of their intention to disregard such omission, and their subsequent denials of hearings thereon, deprived Petitioner of any hearing thereon, whatsoever, in order

to show the inadequacy of any such evidence *if the same had ever been introduced* to support said judgment and decisions.

(2) Its violation of its own procedural rules (Rule 5), in regard to restricting the record on appeal, and in allowing augmentation thereof (Rule 12), by confirming the ruling of the District Court of Appeal granting Respondent's motion to augment said record on appeal in this respect, over the objection of Petitioner, without said Court giving any legal grounds therefor, either then or thereafter, and thereby including oral testimony therein of a legal opinion of a non-attorney employee of the insurance carrier as to the alleged continuity of two earlier, cancelled policies constituting one, but without connecting them with the policy under which the death benefits involved in this action were paid, and by *the express reliance of these courts upon such oral, incompetent opinion thus allowed by this augmentation in sustaining said judgment.*

(3) Its total disregard of, and silence in respect to, Respondent's failure to present any evidence in respect to the next most essential fact needed to establish her title to the whole of said death benefit, to wit, her failure to introduce any evidence of any *surviving community interest* in her with the insured employee, as her divorced husband, or any power or capacity in said employee to perpetuate any such community interest of theirs in, or to make the Respondent an irrevocable beneficiary under, or to perpetuate, the policy in effect on the dates of their Interloeutory

Decree of Divorce on March 9, 1953, and of their Property Settlement Agreement on February 14, 1953, and following the cancellation of said policy on July 14, 1953, (which matters had been called to said court's attention), whereby Petitioner was denied any opportunity to have a hearing thereon or to answer, or to understand, or to be heard, in respect to the court's justification of its silence or reasoning thereon. These decisions were expressly denied publication by order of said courts.

(4) Its denial of the aforesaid due processes on behalf of Petitioner, without prior notice, warning, or means of expectation, and *to her utter surprise,* and with no opportunity thereafter to have any hearing thereon, also without reference to, or explanation of said denials, although these defective proceedings had theretofore been called by Petitioner to the attention of said courts, both by her Petition for a rehearing by the District Court of Appeal (denied December 18, 1964), and by her Petition for a hearing by the State Supreme Court (denied January 13, 1965), both of which were denied without hearing or explanation, whereby Petitioner was denied any opportunity for a hearing thereon, and was thus deprived of her property in and to said insurance benefits under said policy without due process of law.

II

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Petitioner herein, Gertrude Crombie, (defendant and appellant in the California State Courts) and Respondent herein, Helen F. Crombie, (plaintiff and respondent in the California State Courts), were the sole beneficiaries, entitled to fifty per cent (50%) each of the death benefits on September 22, 1958, under a Group Life Insurance Policy, carried on said date by The Equitable Life Assurance Society of the United States upon the life of Francis J. Crombie, as an employee of Mackay Radio and Telegraph Company, a subsidiary of International Telephone and Telegraph Corporation, the principal insured as "Employer" under said policy, insuring the lives of its employees and the employees of all its subsidiaries. However, neither the policy in effect on the date of death of Francis J. Crombie, the insured employee, on September 22, 1958, nor any of its terms, nor its date of execution, nor proof of its relationship to any prior cancelled policies or contracts, were ever introduced into evidence.

Said insured employee was divorced from Respondent, Helen F. Crombie, by final decree entered on March 26, 1954, in the Superior Court in San Francisco. He thereupon married Petitioner, Gertrude Crombie, on April 13, 1954. He died on September 22, 1958, leaving a death benefit to his said two beneficiaries under said policy then in effect, though never introduced into evidence, in the said sum of $16,800.00, with $8,400.00 to each of said beneficiaries.

The Respondent at once made claim to the full amount of said benefits to wit, $16,800.00, on the grounds hereinafter set forth, in consequence whereof the two parties and their attorneys entered into a letter agreement, dated July 24, 1959, with instructions, and directed to said insurance carrier, The Equitable Life Assurance Society, to pay said sum of $16,800.00 by check made out to the joint order of the two parties hereto as the "sole beneficiaries of subject policy," and their attorneys, and to deliver the same to California-Pacific Title Insurance Company of San Francisco, "as depository for the account of said beneficiaries, . . . and subject to said $16,800.00 being apportioned, divided and paid to said respective beneficiaries," as "a Court of competent jurisdiction by final decree, fixes and adjudicates the rights of the respective beneficiaries."

Respondent filed suit on November 10, 1959 to quiet her title to the entire $16,800.00 in herself, together with accrued savings account interest thereon, since the deposit thereof with said depository. Defendant and Appellant filed Answer and Cross-Complaint to quiet her title to said $8,400.00 with interest thereon due her under said policy. Said complaint alleged that said insured employee had designated "defendant, Gertrude Crombie, as beneficiary of said policy," whereby "defendant claims an undivided one-half (½) interest in the proceeds from said policy" (Cl. Tr. 4:8-11); and that said defendant "was the widow at the time of his death." (Cl. Tr. 3:21-23.) Said complaint also "incorporated" said escrow agreement, dated July 24,

1956, "by reference as if fully set forth herein," which agreement, as above noted, designated the two parties to said action as "sole beneficiaries of subject policy." (Cl. Tr. 8:14, 15.) At the trial, Petitioner (defendant) introduced into evidence a printed statement of the insurance carrier that the said parties were equal beneficiaries under said policy. (Def. Exh. A, hereinafter set forth.)

How then did Respondent justify her claim to the whole of said death benefits? Said complaint set forth the theory upon which Respondent (plaintiff) claimed this entire amount, as being based on an *unproven assumption*, supported by no evidence whatever, that the policy in effect at date of death, on September 22, 1958 (Cl. Tr. 3:22, 23), (which policy had never been introduced into evidence, nor were any of its terms or date of execution, or relation to other policies or contracts, testified to at the trial), was, in fact, the same policy as that earlier Group Life Insurance Policy for successive One Year Terms, automatically renewed unless cancelled, which was dated August 14, 1929, and was expressly cancelled as of July 14, 1953. (Pl. Exh. 7, last 37 pages thereof.) Also, said complaint assumed, without evidence, that the policy in effect at insured's death was the same policy as that certain superceding Group Life Insurance Policy dated July 14, 1953, which was expressly cancelled and rewritten on March 12, 1956. (Pl. Exh. 7, first 23 pages and p. 23 thereof.) No proof of any relationship between these policies was ever introduced at the trial, either oral or written, or of any relation

of these two cancelled policies with the policy in effect on September 22, 1958. The insurance company had, however, given the same number to each, but with no evidence of similarity or continuity of terms with said prior policy, cancelled as of March 12, 1956. Admittedly, by the terms of these two earlier, cancelled policies, which were introduced into evidence, they provided for ever increasing premiums and benefits each year. Said first policy dated, August 14, 1929, had a death benefit when cancelled on July 14, 1953, *if the insured employee had then died,* of only $11,750.00, according to the allegation and admission of Petitioner's Answer and Cross-Complaint. (Cl. Tr. 36:7-23; See also, terms of said two prior cancelled policies—Pl. Exh. 7.)

Respondent, by her complaint, further relies upon a Property Settlement Agreement, dated February 14, 1953, between said insured employee and the Respondent, at which time the latter was the wife of said employee, which agreement was made a part of an Interlocutory Decree of Divorce, entered March 9, 1953, and of the Final Decree between said parties, entered March 26, 1954. (Pl. Exh. 1.) By this agreement said employee undertook to assign to Respondent all his community interest with Respondent in said policy of August 14, 1929, and to make the Respondent, the irrevocable beneficiary under said policy in respect thereto, and keep such policy in full force and effect (which the insurance carrier thereafter advised him, in his endeavor to carry out this undertaking, could not be done under the terms of the policy, Pl.

Exh. 5; see also Pl. Exhs. 2 and 4). Under said earlier, cancelled, unconnected policy, the benefits thereto accrued only as each month's premiums were paid, and no part of any of the employee's contributions, after March 26, 1954, were the community property of these parties. Moreover, said policy never had any cash surrender, loan, or assignable value at any time. Furthermore, after the employee's marriage to Petitioner herein on April 13, 1954, all of such contributions were made entirely from the mutual community earnings of Petitioner and said employee.

Said Supreme Court and District Court ignored all these facts, and omissions of evidence, and made no reference thereto in their said judgment and decisions, though such omissions of evidence were repeatedly called to their attention. Petitioner was thus deprived of any opportunity to have a hearing thereon or to meet said evidence if introduced, or to obtain due process in respect thereto.

III

RECORD OF NO EVIDENCE, NO OPINION THEREON, ABSENCE OF DUE PROCESS AND NO HEARING ALLOWED THEREON.

1. As above indicated, no evidence was introduced of the policy in force at date of death of insured, under which the death benefits were paid into escrow hereunder and upon which the present action to quiet title thereto is based. Moreover, no direct evidence was introduced at the trial, as to who were the bene-

ficiaries under said undisclosed policy, other than the assumptions and admissions of such two beneficiaries indicated in the complaint, quoted above, and in the certificate of the carrier introduced by the Petitioner (Def. Exh. A), as follows:

> "Certificate of Equitable Life Assurance Society of the United States. . . . the records now show the beneficiary duly designated by Francis B. Crombie to be Gertrude Crombie, Helen Crombie. Effective Nov. 9, 1954, (Cert. No.(s) 2124C, subject to the right of the Employee to change the beneficiary in accordance with the provisions of said Group Policy. . . . /s/ Ray D. Murphy, President."

The first amendatory rider of the superceding policy, dated July 23, 1953, though subsequently also cancelled and replaced (Pl. Exh. 7, p. 15, of the first 23 pages), read as follows:

> "The beneficiary with respect to an employee insured under the policy who on July 23, 1953 was insured under Group Policy No. 3088, which this policy replaces shall be the person or persons designated as the beneficiary under said replaced policy until the employee thereafter designates a beneficiary for the insurance hereunder, or changes the beneficiary as set forth in this provision."

The designation of both beneficiaries under the policy in effect on November 9, 1954 (Pl. Exh. 6) was made on said date as indicated in said Defendant's Exhibit A.

2. No decision or opinion was ever rendered in these proceedings that made any reference to or regarding the effect of the absence of the foregoing evidence, nor of any evidence showing any relationship of this undisclosed policy of September 22, 1958 to the prior cancelled policies, nor to the effect of such lack of evidence showing any relationship of this undisclosed policy to the prior cancelled policies.

3. Nor was any evidence introduced, nor any decision or opinion rendered, referring to the connection or application of such policy at death of the insured to the Property Settlement Agreement of February 14, 1953, and the associated divorce decrees, or showing the later existence of any *surviving community interest* of the insured with Respondent, or of any power or duty in the insured over such final policy to make Respondent an irrevocable beneficiary under said undisclosed policy, or to perpetuate any such powers and rights under such earlier policies within the later policies, beyond the then extent of *such community interest* of said parties on February 14, 1953, or beyond the terms and benefits of the *then existing policies.* No decision or opinion was ever expressly rendered on these points. These matters were carefully ignored in all said decisions, as shown by the copies of these decisions hereto annexed. This by-passing of these issues in these decisions constitute a denial of due process.

4. Further denial of due process was occasioned—to the unanticipated surprise and without prior notice to Petitioner—when the District Court of Appeal,

after final argument, ignored the Supreme Court's rules of procedure (Rules 5 and 12), and by its admission thereupon of incompetent, oral, inadmissible evidence of an unqualified witness as to the continuity of the two cancelled policies, and rendered its decision against Petitioner *almost solely* by its reliance upon that inadmissible evidence. This decision was affirmed by the Supreme Court's decision in its denial of any hearing thereon to Petitioner, in respect to this unpredictable and erroneous decision. Yet, the absence of such evidence and any consideration thereof in their decisions, had theretofore been called to the attention of these courts.

The surprise and unpreparedness of Petitioner for these final decisions came too late for any presentation of evidence or argument thereon. They were unpredictable as indicated by the procedure that had led up to them. The court at the pretrial hearing had recommended as follows:

> "It is recommended to the trial court that any issues of law be first determined as the rulings thereon may either restrict the remaining factual issues to be tried or may entirely dispose of them without the necessity of a trial thereon. To that end it is recommended that all documentary evidence to be relied upon by the parties be first admitted and that, the Court thereupon upon proper motion, determine the effect of such documents on the factual issues hereinabove delineated."

The trial court conformed to this procedure, and sought to limit it to the introduction of written docu-

ments, and their authentication. Petitioner at that time did not know that the massive exhibit of insurance policies introduced by Respondent (Pl. Exh. 7) did not include the policy that was in effect on September 22, 1958. It was not until after the appeal had been perfected that this omission was discovered. It was not Respondent's duty to supply it. Petitioner had taken her appeal on the Clerk's Transcripts and Exhibits alone, and the trial court had denied the Respondent the right to augment the record on appeal, in conformity with the Supreme Court's Rule No. 5. After the Opening Brief of Petitioner (appellant) was filed, Respondent moved to have the record on appeal augmented to include the Reporter's Transcript, in order to present said oral testimony of said unqualified witness—a Mr. Hayden. Reluctantly (at least so it appeared to Petitioner) the District Court granted the Respondent's motion of augmentation, over Petitioner's objection, provided Respondent agreed to pay all costs of preparing such additional transcript. There was no indication by the District Court that it intended to give favorable consideration to this unqualified, inadmissible evidence, either at the hearing of this motion, or at the final oral argument when all briefs were in. Nevertheless, the Respondent's brief did place great weight on this evidence in her Reply Brief, stating in part:

> "The master group policy (Pltf's. Ex. 7, RT 25: 20-26) was always the same policy. . . This is proved by Pltf's Ex. 7 (RT 25:20-26) and the testimony of Walter R. Hayden (RT 26:1 to 29: 20), official of the Equitable Life Assurance So-

ciety. His testimony is so emphatic and complete, —that a large part of witness Hayden's testimony is set forth as follows:

'Mr. Hettman: Q. Mr. Hayden, I give you Plaintiff's Exhibit 7, and I want to ask you some questions regarding that. I will ask you first whether the policies, and all exhibits there, refer to one group policy Number 3088?

A. To the best of my knowledge they do . . .

Q. . . . look on the notation on the back, where it has the word "Cancelled." Will you tell us about that?

A. That was the Society's practice of cancelling this policy here, indicating that it's being continued under this new form. . . . the amount of premium would be changed each year. . . . The number of employees and the amount of coverage. . . . different benefits were added—additional benefits were added to it'." (RT 26:19-20; 35:16-26.)

Rule 5 (f) of the Rules of the Supreme Court read as follows:

"Where the appellant has designated only a clerk's transcript consisting of part or all of the matters specified in Rules 5(a) and 5(b) and has not given notice to prepare a reporter's transcript, the respondent may not require the preparation of a reporter's transcript but he may counter-designate any exhibits, affidavits, papers or records, other than instructions, which may properly be included in a clerk's transcript."

Rule 5(a) of said Rules, above referred to, provides:

"Within 10 days after filing the notice of appeal, the appellant shall serve on the respondent and file with the clerk of the superior court a notice

designating the papers or records on file or lodged with the clerk, including the clerk's minutes and any written opinion of the superior court and exhibits either admitted in evidence or rejected which he desires incorporated in the record on appeal."

Petitioner would have had no objection to such augmentation on the appeal under Rule 12(a), if she could have barred the appellate court from giving any consideration or weight to this inadmissible testimony—not so much in respect to the only two policies contained in said Exhibit 7—but also to prevent its unjustifiable application of this testimony to *the policy in effect on September 22, 1958, which was not even in evidence.* This appeared quite inconceivable, yet it is precisely what the two appellate courts did do. (See Opinion attached hereto.)

5. These proceedings involved a denial of due process under the foregoing rules and directives, and the denial of both a rehearing or a hearing thereon which will result in taking of property without due process of law in violation of Amendment XIV, Sec. 1 of the U. S. Constitution, and of Art. I, Sec. 13 of the Constitution of California, unless a Writ of Certiorari is issued hereunder. Such a denial of due process by the Supreme Court of the State of California in its denial of a hearing by said Court on these issues involved a Federal question of substance not heretofore decided by this Court in this proceeding.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed

to the Supreme Court of the State of California commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Supreme Court of the State of California had in the case numbered and entitled on its docket, 1 Civil No. 21,287—Helen F. Crombie, Appellee and Respondent v. Gertrude Crombie, Appellant, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of California in denying a Hearing after Hearing in and affirmance by the District Court of Appeal of California, of the trial court's judgment, be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, San Francisco, California,
April 12, 1965.

PAUL E. SLOANE,
Attorney for Petitioner.

(Appendix Follows)

Appendix

In the District Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 21,287

HELEN F. CROMBIE,
Plaintiff, Cross-Defendant and Respondent,

vs.

GERTRUDE CROMBIE,
Defendant, Cross-Complainant and Appellant.

OPINION
(Not to be Published)

This is an appeal by a second wife from judgment quieting title of plaintiff, the first wife, in the proceeds of a policy of insurance upon the life of the husband, now deceased.

Plaintiff and decedent married in 1925. In 1929, decedent's employer obtained a group life insurance policy for its employees. Decedent elected to become

an insured, designated plaintiff as the beneficiary, and thereafter contributed through payroll deductions to payment of the premiums. The group policy provided for automatic renewal on each anniversary. From time to time the policy was modified, usually to increase benefits. Occasionally, a new policy, including recent modifications was issued. Such a reissue occurred in July, 1953. All policies, however, bore the same number, and an employee of the insurer testified that all certificates, from 1929 on, represented the same basic insurance contract.

Plaintiff and decedent executed a property settlement agreement February 14, 1953. It described the above policy and provided: "Husband further agrees to make and does make Wife the irrevocable beneficiary thereof and to keep and maintain said policy in full force and effect." Because of the terms of the group policy, the insurer did not accept decedent's ensuing attempt to make irrevocable the designation of plaintiff as beneficiary. Interlocutory decree of divorce, entered March 9, 1953, approved and incorporated the agreement, as did final decree entered a year later. In 1954, decedent and defendant were married, and decedent, without notice to plaintiff, designated defendant as beneficiary to the extent of half the policy proceeds. The insured husband died in 1958. Plaintiff brought this action to quiet her title to the policy proceeds of $16,800, and defendant cross-complained for half thereof. By stipulation the insurer paid the money in escrow to await judgment. Plaintiff prevailed and defendant appeals.

By the property settlement agreement, decedent waived his right to remove plaintiff as beneficiary of the policy. That agreement, and the decrees incorporating it, transferred to plaintiff all decedent's rights in the policy. It follows that he had nothing to transfer to defendant by the attempted change of beneficiary in 1954 (Mutual Life Ins. Co. v. Franck, 9 Cal. App. 2d 528, 537-8; Mahony v. Crocker, 58 Cal. App. 2d 196, 202-3).

Defendant, however, argues that this rule can apply only to the policy in effect in February, 1953, that the certificate issued to the employee in July of that year is new, and thus not subject to the agreement. But this view is patently unsound. The evidence shows that the same policy was in effect from 1929. Its benefits were occasionally altered by agreement between employer and insurer, but it bore the same number throughout and was treated by the insurer as being but a continuation of the 1929 policy. To accept defendant's view would be to render wholly illusory decedent's agreement to keep the policy in effect and maintain plaintiff as its beneficiary.

Judgment affirmed. Pursuant to stipulation, cost of reporter's transcript is not awarded as costs.

Draper, P. J.

We concur:

Salsman, J.

Devine, J.

Filed November 20, 1964.

Lawrence R. Elkington, Clerk.

In the District Court of Appeal
State of California
First Appellate District

DIVISION THREE

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1 Civil No. 21,287

HELEN F. CROMBIE,
Plaintiff, Cross-Defendant and Respondent,

vs.

GERTRUDE CROMBIE,
Defendant, Cross-Complainant and Appellant.

BY THE COURT

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated December 18, 1964.

Draper, P. J.

Filed December 18, 1964.
Lawrence R. Elkington, Clerk.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Jan. 13, 1965

Dear Sir:

I have this day filed order "Hearing Denied."

In re: 1 Civil No. 21,287, Crombie v. Crombie.

Respectfully
William I. Sullivan,
Clerk.

Received January 14, 1965.

26908—877 7-64 2500 OSP

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

GROUNDS, STATEMENT OF CASE AND SPECIFICATION OF ERRORS

These areas appear to be amply covered in the foregoing, and overextended Petition. The Statements therein of the Issues and Grounds, the Statement of matters involved, and the Record of errors, would appear to furnish their own answers as fully as if restated here. Both there and here, the present counsel's inexperience in this field of law, in spite of fifty years of law practice, will be too apparent. But he and Respondent may gain some reassurance from the basic principles of Grounds for Certiorari laid down in the following authorities:

Polko v. Connecticut (1937), 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288;

Napue v. Illinois (1959), 360 U.S. 264, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217, 47 Cal.L.R. 238;

Witkin: "Summary of Calif. Law" (1960), Vol. 3, pp. 1903, 1904, 1914-1918.

Also, it appeared to counsel herein that the same conclusions were reached in the one day conference at Harvard University on this subject in commemoration of the second centennial of John Marshall's birth, attended by the present counsel ten years ago; at which several members of the present United States Court participated.

It appears so completely incredible and frustrating, in our land of enlightened justice, that the arguments

and issues presented by a litigant can be so completely ignored when seriously urged, and seemingly upon valid grounds to produce a favorable judgment, and that the rug can be so completely and unexpectedly jerked out from under the litigant at the last moment, too late to give him any opportunity for an adequate hearing thereon, that the present Petitioner and her counsel have felt that a solution must necessarily be found and qualify under this final proceeding—this Petition for a Writ of Certiorari. It is fully realized how rarely such a Writ is ever granted in this court; how rarely such a petition can qualify. How true it is that this proceeding cannot enter into the question of challenging the state court's determination of the law and factual problems involved, is recognized. But, in the present case, the state courts never openly, articulately considered or seemed aware of the problems. They never even mentioned them, or discussed them. Their reasons may have been sound if disclosed. We have no way of knowing. What were those reasons? Aren't we entitled to hear them and be given a chance to meet them?

II

JURISDICTION AND STATUTORY RIGHTS HERE INVOLVED

We appreciate that grounds of jurisdiction must be set forth more explicitly than merely a declaration that they come within the purview of Section 1 of the Fourteenth Amendment of the United States Con-

stitution, or Section 13 of Article I of the California State Constitution. The following grounds set forth in the United States Supreme Court Rule, 19, certainly apply.

1. State District Court of Appeal, as affirmed by the Supreme Court's denial of a hearing thereon, has decided a federal question herein under said United State Fourteenth Constitutional Amendment in regard to taking property without due process of law, in a way in conflict with applicable decisions of both the California State law and of the United States Supreme Court, and "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision."

2. The California Supreme Court in thus affirming said judgment of the State's District Court of Appeals "has decided a federal question of substance not theretofore determined" by the United States Supreme Court, "or has decided it in a way probably not in accord with applicable decisions of" said United States Supreme Court.

3. The rights denied to Petitioner in the proceeding of the State courts herein are "of the very essence of a scheme of orderly liberty," and have been so decided as to violate a "principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental." *Polko v. Connecticut,* (supra). *Witkin,* (supra) pp. 1903, 1904.

4. Said judgment as thus affirmed did not give Petitioner "reasonable notice and opportunity for

hearing," in respect to the new, incompetent and inadmissible matters which the court relied upon in said judgment, and improperly admitted into the record on appeal by its order to augment the record on appeal in violation of its Rule 5(f) on Appeals. Although the proceedings of Appellate Courts of California do not constitute Administrative proceedings, it would appear that, where those courts ignore substantial evidence or the lack of it, the same rules would apply to the decisions of such courts. See cases cited and applied in Witkin, in respect to administrative proceedings:

"Summary of Calif. Law" Vol. 3, pp. 1926, 1927.

The State statutes not properly followed in the foregoing respects appear to have been disregarded in some degree under the following code enactments:

Calif. Civil Code, Secs. 588-592, 607, 956, 956(a), 1067-1077.

No effort has here been made to quote from our briefs in the State courts showing the extent to which these matters were called to the attention of State Courts, and yet were totally ignored in their decisions. We need, at this point, merely point to the Second Ground urged in Petitioner's "Grounds For Hearing" by the California Supreme Court (pp. 16, 17), entitled: "Denial of Due Process by Disregard Of Appeal Rule 5," and the incorporation therein by reference of "Ground 6" of Petitioner's "Petition For Rehearing" before the District Court of Appeal (pp. 11-14, and pp. 2-11), entitled "Its Disregard Of Rule

5(f) And Its Reliance Upon Evidence Presented Thereby." It hardly seemed appropriate to recite these grounds herein at length, but rather to preserve them for inclusion in the record hereafter to be prepared and filed herein by Petitioner upon this court's order, in the event this Petition is deemed meritorious.

CONCLUSION

Until this further record shall be desired, the undersigned, in order to give this Petition and Brief more probative value, hereby sets forth the following certification, in a form equivelent to an affidavit sworn to before a Notary Public under California law:

The undersigned, under penalty of perjury, hereby declares and certifies that all said statements herein, and in said Petition made, are known to the undersigned to be true of his own knowledge, and that the same are true and correct.

Dated, San Francisco, California,
April 12, 1965.

Respectfully submitted,
PAUL E. SLOANE,
Attorney for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 1102

GERTRUDE CROMBIE, *Petitioner,*

vs.

HELEN F. CROMBIE, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATE COURT'S DECISION APTLY PRESENTS STATEMENT OF THE CASE

By misstatements and omissions of pertinent facts, petitioner postulates the false premise that she was denied life insurance benefits without due process of law. Respondent opposes the petition upon the ground that the claim is unsound and that no valid or sustaining reason is shown or exists for the exercise of

this Court's discretionary certiorari jurisdiction for review under 28 U.S.C., §1257, or otherwise.

Significantly, the decision of the District Court of Appeal of California in this case, appended to petitioner's brief, is unassailed on either factual or legal bases by petitioner; hence, in the interest of brevity, the opinion, written by Honorable Presiding Justice, Murray Draper, unanimously concurred in by Associate Justices, Byrl R. Salsman and Preston Devine, and subsequently, on a Petition for Rehearing, and then affirmed on a Petition for Hearing in the Supreme Court of California, is incorporated herein by reference as if set out at length herein, and respondent respectfully requests this Honorable Court to read and consider this California decision as part of respondent's opposing brief.

II

PETITIONER IN ERROR AS TO ASSUMED FACTS

The core of petitioner's claimed grievance is that respondent not only failed to present the most essential evidence of which the case was susceptible, but that such alleged failure was without prior notice or warning to petitioner and without her expectation and to her "utter surprise."

Both petitioner and respondent, in the Trial Court, sought affirmative relief on their separate and independent claims and both offered and had received in evidence proof deemed competent, relevant and ma-

terial. Respondent offered and had received in evidence nine (9) exhibits, whereas, petitioner sought and had received in evidence only one (1), to wit: Defendant's and Cross-Complainant's Exhibit "A".

Specific reference to the proceedings wholly negatives petitioner's contentions of an unfair trial (RT 46:7-9), viz:

> "Mr. Sloane: And I have just one document, one little tag—one document that I wanted to introduce into evidence; and counsel didn't want to include this among his offer.
>
> And this is an acknowledgment by the insurance company of the fact that he did request them, and they do accept his request to make the two parties beneficiaries, fifty-fifty each."

Although the husband's attempt to remove his first wife as sole beneficiary of his group policy and to cut the second wife in as to one-half of the proceeds thereof, without the first wife's consent, and without the knowledge or approval of the Trial Court, was invalid, the Trial Court admitted the only proof offered by petitioner, consisting of said "tag". However, the Court at the time pointedly observed, in part (RT 48:1-7):

> "The Court: * * * —if there was a violation of his agreement and a violation of a court order, it would be an idle gesture anyway, wouldn't it?
>
> Mr. Brewer: Yes, it would.
>
> The Court: I don't see that it makes any difference, actually.
>
> Let it be received in evidence as Defendant's (Gertrude Crombie) 'A'."

Petitioner not only made no objection during the trial to respondent's introduction of eight exhibits, embracing the group insurance policy around which the case revolves, Respondent's Exhibit "7", duly authenticated by the Vice President of Prudential, as carrier, but petitioner's attorney Sloane admitted in open Court that by doing so, respondent was presenting part of petitioner's own case (RT 9:19-23), viz:

> "The Court: Well, you have no objection, I take it, Mr. Sloane?
>
> Mr. Sloane: No. In fact, counsel is going to present part of my case by the time he finishes introducing those exhibits."

Objection, if any, that petitioner ever had to subject Group Insurance Policy was withdrawn by petitioner's counsel during the trial (RT 25:11-15), viz:

> "Mr. Sloane: Excuse me; I am—Let me finish my statement. I am willing to withdraw my objection since it's all there, and one certificate covers the two, but I did feel that that understanding should be made clear at this time, that there really are two distinct policies."

Witness, Walter R. Hayden, Public Service Representative of the carrier, Equitable Life Assurance Society, under cross-examination by petitioner's attorney Sloane, referring to Respondent's Exhibit "7", the Group Life Insurance Policy involved, testified, in part (RT 34:1-6), viz:

> "The Witness: Well, no opinion of mine is necessary. There is the contract, and it's certified by the president—the vice-president of the Society that they are true and exact copies to the

best of his knowledge. The original policies are in the hands of the American Tel & Tel—or the International Tel & Tel."

Further, petitioner's counsel, again referring to Respondent's Exhibit "7", the file copy of Group Life Insurance Policy 3088, with the attached affidavit of Vice President, Charles F. Andolsek, admitted in open Court during the trial that he had no objection to its introduction in evidence (RT 35:8-12), viz:

(Mr. Sloane) "Q. Yes. Well, that's all right. I have no objection to the introduction of it.

The Court: All right. Do you have any other questions, Mr. Sloane?

Mr. Sloane: No further questions."

Thus, it conclusively appears from the trial record that petitioner was not thwarted nor otherwise denied due process, but had her only offer of evidence received as Petitioner's Exhibit "A", and her counsel consented to the introduction of all of respondent's nine (9) exhibits, except Exhibit No. "9", a letter from one of the carrier's attorneys disclaiming any intention upon the part of the carrier to favor either litigant.

III

PETITIONER FURTHER IN ERROR AS TO LAW ASSUMED APPLICABLE TO CASE

Although not mentioning, discussing or showing lack of applicability of the law as applied by the Courts of California to the instant case, the tone of petitioner's brief vaguely suggests that Federal juris-

diction law was ignored and flouted; hence, *Mutual Life Ins. Co. v. Franck,* 9 Cal. App. 2d 528, and *Mahony v. Crocker,* 58 Cal. App. 2d 196, the two California decisions cited in the opinion of the California District Court of Appeal, upholding the Trial Court in this action, annexed to plaintiff's petition, are contrary to the rule on similar facts followed by Federal jurisdiction. However, such assumption, if it exists, is wholly inaccurate, since the Federal Court in cases before it, under facts similar to those of the instant case, has not only referred to, but adopted the California rule.

For instance, *Metropolitan Life Insurance Company v. Enright,* 231 Fed. Supp. 2d 275, dealing with the identical question posed by the instant case, cites and approves the *Franck* case, supra, and likewise decides that rights adjudicated by a divorce decree transcend insurance contract rights, holding, at p. 277:

> "The applicable portion of the decree of divorce provides:
>
> "' * * * the plaintiff shall maintain a policy of life insurance upon his life, in the amount of Six Thousand Dollars ($6,000.00) in the Metropolitan Life Insurance Company, bearing policy number 2231G [the number of the policy here involved], with the defendant as the irrevocable beneficiary therein, and with the right in the defendant to name a successor beneficiary, in the event of her prior death * * *.'
>
> "Defendant Enright maintains that under the divorce decree and the property settlement agreement, Marie Rankin became irrevocable bene-

ficiary with the right to name a successor beneficiary (although she did not do so), and she thereby acquired a vested right in the policy *which right was not divested by Rankin's subsequent attempted change of beneficiary nor by Marie's own death.*

"[1] It is well established that terms of a property settlement agreement may preclude the insured from making a change of beneficiary even though he be given this right by terms of the insurance policy. *Western Life Insurance Company v. Bower,* 153 F. Supp. 25 (D. Mont. 1957); *Equitable Life Assur. Soc. of United States v. Wilkins,* 44 F. Supp. 594 (E.D.N.Y. 1942); *Mutual Life Ins. Co. of New York v. Franck,* 9 Cal. App. 2d 528, 50 P. 2d 480 (3d D. Calif. 1935)." (Emphasis ours.)

Thus, the California and the Federal rule being the same with respect to facts such as those involved in this case, renders petitioner's assumption to the contrary, sheer illusion.

IV

NO FEDERAL OR QUESTION OF GENERAL INTEREST INVOLVED AND REVIEW BY CERTIORARI WHOLLY UNJUSTIFIED

The respective claims involved here are pinpointed by a Court-approved contract between the husband as the insured and his first wife, the respondent, as irrevocable beneficiary, and presents no Federal or question of general import. In fact, petitioner and

respondent, in writing, acknowledged that their respective claims involved the interpretation of California law only (CT 11:5-6), viz:

> " * * * the rights of these claimants hinges upon the divorce and community property laws of the State of California."

Also, petitioner and respondent, in writing, further acknowledged that a State Court is the proper forum, with no suggestion of a Federal question, (CT 10:6-11), viz:

> "Said claimants, * * * desire * * * to litigate their respective rights to said insurance proceeds in the Superior Court of the State of California in the light of the laws of this State applicable to the situation."

V

ARGUMENT

The persistence to disagree and appeal demonstrated by petitioner, the second wife, on fanciful and untenable grounds, notwithstanding her acknowledgement that her claim is controlled by the divorce and community property laws of California, and that the Superior Court of California is the proper forum, strongly suggests an implacable and unreasoning belligerency toward the respondent, the first wife, the irrevocably-designated sole beneficiary.

The opinion of the Appellate Court of California, appended to petitioner's brief, rests upon adequate independent State grounds, was affirmed by the Su-

preme Court of California, so that whatever the motive, petitioner has utterly failed to show grounds under Rule 21 of this Honorable Court, for the exercise of certiorari jurisdiction.

The alleged Federal issue advanced by petitioner here, and clearly not meeting standards for the exercise of wholly discretionary certiorari jurisdiction, is so insubstantial as to border on the frivolous.

Further, the authorities cited by petitioner do not even remotely relate, nor are they pertinent to the actual facts or law of this case. Since an abstract and academic discussion of them would serve no productive purpose, further comment is withheld as the actual and precise issues of this case were correctly resolved by the judgment of the California Courts below.

In effect, petitioner seeks a review of this California judgment, embracing adequate and independent, State grounds. This Court has consistently refused to use its discretionary power to review under such situation. *Fox Film Corp. v. Muller,* 296 U.S. 207, 80 L.Ed. 158.

The only power of this Court over State judgments, such as involved here, is to correct them to the extent they incorrectly adjudge Federal rights. *Whitney v. California,* 274 U. S. 357, 362-3; *Safeway Stores v. Oklahoma,* 360 U.S. 342, n. 7.

VI

CONCLUSION

The decision below, turning upon its own narrow domestic relations and personal contract grounds, and controlled exclusively by the divorce and community property laws of the State of California, will affect few, if any, other than these litigants; hence, we respectfully submit that petitioner has failed to show the requisite or any grounds for a review by this Court and that this Petition for Writ of Certiorari should be denied.

Dated, San Francisco, California,
June 10, 1965.

Respectfully submitted,
WALTER E. HETTMAN,
JULIAN D. BREWER,
Attorneys for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 83

GERTRUDE CROMBIE, *Petitioner,*

vs.

HELEN F. CROMBIE, *Respondent.*

REPLY BRIEF OF PETITIONER

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In the Supreme Court
OF THE
United States

October Term, 1965

No. 83

Gertrude Crombie,	*Petitioner,*
vs.	
Helen F. Crombie,	*Respondent.*

REPLY BRIEF OF PETITIONER

I. BASIC PROCEDURE HAS HERE BEEN IGNORED, WITH NO CONFLICT OF EVIDENCE, OR DISPUTE OF LAW INVOLVED.

The common saying, "ignore the problem and maybe it will go away" has certainly been followed by respondent herein. As incredible as this may sound, that has been the unfailing and altogether too successful effort of the plaintiff and respondent throughout all the proceedings in this action, beginning with the original complaint on November 10, 1959. She and her

counsel have done it again in their present Brief in Opposition to this Petition—for Writ of Certiorari—as more fully set forth in the next section herein. This is respondent's last and final hurdle to surmount in order to arrive at a successful conclusion of her six years' opposition by this method to any consideration whatsoever of this one basic issue involved throughout this case.

This issue is the *non-existence of any evidence herein* of the insurance policy, and of any community interest of respondent therein, effective on September 22, 1958—the date of husband's death. It is upon this policy and issue alone that respondent's claim of title to the entire death benefit from said policy is here predicated. The judgment of the California District Court of Appeal likewise closed its eyes to the non-existence of any such evidence. The Supreme Court of California did likewise when it thereafter denied appellant's petition for a hearing before it on said judgment. The present Petition for a Writ of Certiorari herein is directed only to the District Court's decision, as its title discloses. Although petitioner may have improperly included also the Supreme Court's denial of such hearing on this decision, in her argument (on pages 1, 2 and 16, of her Petition), that was done only because the Supreme Court had thereby affirmed as due process this disregard of absence of essential evidence by all three of the California Court's decisions, which in turn were based upon respondent's persistent assumption that this issue did not exist. As incredible as that may appear, such was

the fact, as this Court can readily verify by looking at the only exhibit that purports to bear upon this issue. Due process of law has thus been denied to petitioner.

Respondent, while admitting in her complaint (See Pet. for Cert., bot. p. 6, and top p. 7), that the insurance policy in effect on the date of husband's death, on September 22, 1958, provided that the death benefits were to be paid equally to the two litigants herein, has, in her final brief herein, again ignored the fact that she had *failed to introduce any evidence* at the trial of this action on August 3, 1962, regarding the terms or conditions of said policy, also regarding its relation to any prior policies or contracts relied upon by respondent, and as to any community interest of respondent existing in this policy, and finally as to any explanation as to why the death benefits should not be paid and divided as provided under the terms of said insurance policy in effect on September 22, 1958. The burden of proof was hers to show why the terms of that policy should not be carried out, since she was claiming all of the death benefits under that policy—not under any prior, previously cancelled policies. By confessing in her complaint that this policy, in effect in 1958, provided for equal payment to the two litigants, respondent-plaintiff established a prima facie case against her claim to the *entire death benefits*. The burden was thus further placed upon her to prove how and why the terms of *this policy in effect in 1958* had been legally changed or superceded so as to permit payment of all thereof to the respondent alone.

This policy in effect on September 22, 1958, was not included in plaintiff's Exhibit 7, or in any other exhibit or evidence introduced at said trial. Said Exhibit 7 included only two earlier policies, both cancelled prior to the execution of the policy in effect on the date of husband's death, under which the death benefits were paid. The second of these earlier two policies was an annual term policy, 23 pages in length, that had been executed on July 14, 1953, automatically renewed each year thereafter until admittedly cancelled on March 12, 1956. In this second policy, respondent never had had any community interest therein whatsoever. No community property of hers had ever contributed to the insurance carrier any part of its premiums. She and said husband were never married during the existence of that policy. The first of these two earlier policies, consisting of 37 pages, was executed August 14, 1929, and was also an annual term policy, automatically renewed each year until it was expressly cancelled on July 14, 1953, and superceded by said second policy, executed on that date, which, in turn was cancelled on March 12, 1956. These were the only policies contained in Exhibit 7.

In respect to this earliest policy of 1929, the husband by a separate Property Agreement, dated February 14, 1953, had assigned his *community interest therein with his former wife,* if any, to her (the respondent), and had undertaken to make her the irrevocable beneficiary thereof and to maintain said, then existent, earliest policy in full force and effect in respect to any community property interest that the

two then owned therein. No other policy than these two, contained in this Exhibit 7, were ever introduced into evidence. Consequently, the policy in effect on September 22, 1958, was never introduced into evidence. The date of its execution was never proven nor alleged, and is still totally unknown in this action. Nor were allegations or proof ever presented as to any of its terms or conditions (except allegations as to its beneficiaries in respect to their respective shares). Nor was there any allegation or presentation of evidence before the trial Court as to the relationship of this policy to any of these earlier policies introduced in evidence by Plaintiff's Exhibit 7, nor as to its relationship to said Property Settlement Agreement of February 14, 1953. Nor was any evidence ever introduced to show that respondent ever had any community property interest in said final policy of 1958.

Certainly, the fact that said final policy in effect on September 22, 1958, was given the same number as was formerly given to these earlier cancelled policies, does not in any wise prove or imply an identity of terms and conditions with said earlier, cancelled, and superceded policies. We also know that all three of these policies included only *some* of the same parties. Moreover, we know that said final policy provided that its death benefits were to be divided equally between the two litigants. (See Pet. for Writ of Certiorari herein, on the last 8 lines of p. 6, and first 6 lines of p. 7 thereof.) Unless this latest policy of 1958 existed contemporaneously in whole, or in part, with

these two earlier policies contained in Exhibit 7 (of which fact we have no evidence), it must have been executed at some time after or on March 12, 1956, on which latter date the policy of July 14, 1953 was cancelled. Petitioner was entitled to some evidence at the trial on this very material fact, and the burden of proof was still upon the plaintiff-respondent to produce it.

We also know that the respondent never owned any community property interest in this latest policy, if executed on or after March 12, 1956, for the simple reason that the respondent and her former husband were not married to each other after this date, and that *all* premiums contributed thereto by the husband to said final policy after said date, were necessarily deducted from his earnings which were entirely his community property with petitioner (not with respondent), since he married petitioner on April 13, 1954, long before this final policy was executed, and he remained married to her until his death in 1958. Moreover, said Property Settlement Agreement of February 14, 1953, expressly provided "That any and all property acquired by either Husband or Wife from and after the date hereof shall be the sole and separate property of the one acquiring the same." (See extracts from said agreement contained in Pl. Exh. 1, quoted at the bottom of p. 32 and top of p. 33 of App. Op. Br., filed in Calif. Dist. Ct. of Appeal, and also made a part of the Certified Record on the present Pet. for Writ of Certiorari.) Neither of said earlier, cancelled, insurance policies contained in said

Exhibit 7, had any cash, loan, surrender or continuing value, or power of perpetuity beyond the month, or term for which premiums had been paid thereon in advance by the employer corporation, or beyond the subsequent grace period of 30 days, as provided therein—or beyond the date of their *express cancellations.* (See quoted extracts from Exh. 7, App. Op. Br., pp. 12, 14-17, and 41, and from the Property Settlement Agreement, Pl. Exh. 1, quoted on pp. 30-32 of App. Op. Br. filed in the California District Court of Appeal, also made a part of the Certified Record on the present Petition for Writ of Certiorari.)

Respondent states in her Brief (p. 2): "Significantly, the decision of the District Court of Appeal of California, appended to petitioner's brief, is unassailed on either factual or legal bases by petitioner." Quite to the contrary, that decision has at all times been assailed by petitioner for its total disregard of the absence of any proof of an essential fact in that case, which that Court erroneously assumed had been proven, without evidence. That Court's decision never once mentioned the policy of 1958. We doubt if it even noticed that such policy was not there. Insofar as that Court recited any facts in its decision, they were true. We are not concerned here with the weight of evidence. We are concerned only with the total absence of any such evidence having been presented at the trial, and of the District Court's erroneous, silent assumption that such evidence was presented. That decision, following respondent's lead, completely ignored the total absence at the trial in this action of

any evidence on these issues. A reference to our briefs presented to that Court, as well as our petition before the California Supreme Court herein, which was denied (all made a part of the Certified Record on this pending Petition for Writ of Certiorari), will likewise show how extensively the petitioner called attention to this omission to those Courts, throughout these hearings, and their complete disregard thereof in each of their decisions—as is more fully set forth in the third section hereof.

Although no stenographic report was made of the oral argument before said District Court of Appeals, we do not believe that counsel for respondent will deny that the following remarks were made in substance in said hearing before said District Court: After appellant (petitioner herein) had called the attention of that Court to the failure of any such evidence whatsoever having been introduced at the trial of this action in the San Francisco Superior Court, on August 13, 1962, one of the District Court Justices asked one of the counsel for respondent, substantially as follows: "What do you have to say to that?" Said counsel thereupon replied: "It is preposterous and without merit. We never heard of it before." This was the only answer thereto offered at that time, or in any of respondent's briefs before any of the California Courts as to said absence of evidence. The next section herein will disclose that said counsel had repeatedly heard of it before. As above noted, the District Court's opinion, likewise, was totally silent on said policy of 1958, and referred to no evidence of

community property interest of husband and respondent in said policy in effect on September 22, 1958. Yet, said court likewise had repeatedly heard of it theretofore. Yet, said opinion and Respondent's Brief have never once referred specifically to that policy or ever mentioned any community property interest of respondent therein. (See Appendix to said Pet. for Writ of Certiorari, and said Certified Record herein.)

Plaintiff's whole procedure throughout this case, beginning with her complaint, has crowded out the real issue by starting at the wrong end of the chain of events, and in failing ever to tie this wrong end in with the first link—the policy in effect in 1958. Petitioner claims that this evidence, *if it had ever been introduced,* would never have disclosed any such tie, and that plaintiff would never have dared to attempt to establish any such tie directly or in the correct order. They have relied throughout only upon inferences thereto raised, not by evidence, but by unsubstantiated declarations of counsel. This reverse emphasis has thus far proven very successful for respondent—to the unanticipated surprise and dismay of petitioner, and has thereby denied to her due process of law.

II. RESPONDENT HERE CONTINUES HER ERRONEOUS ASSUMPTION THAT THE POLICY OF 1958 WAS INCLUDED IN HER EXHIBIT 7, IN CONSEQUENCE WHEREOF NO PART OF HER ARGUMENT NOR OF THE DISTRICT COURT'S DECISION REFER TO THAT POLICY.

When respondent, on May 11, 1965, requested this Court for additional time within which to file her

Brief in Opposition to our petition, in order to enable her counsel to examine the available exhibits introduced in the trial Court and on appeal and thus to make her "opposing brief as factual as possible", we assumed that they may have become alarmed by the possibility that the policy in effect in 1958 was in fact not there. If they made any such examination they refrained from disclosing their discovery in their brief, or they shut their eyes to such discovery. There is no such policy contained in Plaintiff's Exhibit 7, which contains only two earlier cancelled policies, and that exhibit is the only best evidence of *any* policies in their own language introduced at the trial. Respondent nevertheless still insists that the policy under which the death benefits were paid, to wit, that in effect on September 22, 1958, *is in evidence* and is contained in this Exhibit 7. That false claim is repeatedly implied in the three pages of her Brief in Opposition directed to this point, as next herein pointed out.

Respondent states (first 4 lines of p. 4, of her said brief): "Petitioner . . . made no objection during the trial to respondent's introduction of . . . the group insurance policy around which the case revolves, Respondent's Exhibit '7'". Again, respondent states (next 4 lines): ". . . petitioner's attorney Sloane admitted in open Court that by doing so, respondent was presenting part of petitioner's own case." This was true, since the two policies alone contained in Exhibit 7 showed that both of them had been cancelled and had nothing to do with the policy in effect

on September 22, 1958. In the center of that p. 4, respondent speaks of the "subject Group Insurance Policy", which should have been the policy in effect in 1958, and not the two cancelled policies in Exhibit 7. This Exhibit includes only these two cancelled policies, and not at all the "subject Group Insurance Policy," of 1958. Again, on the same page 4, respondent stated, "Witness, Walter R. Hayden, ... referring to Respondent's Exhibit '7', . . . testified that, 'There is the contract.'" What contract? Not that in force in 1958, which was not included in Exhibit 7. As Exhibit 7 will show upon examination, it did not refer in any way to the policy in effect in 1958, but only to the two earlier cancelled policies, to the earlier of which the Property Settlement Agreement no doubt alone had some application. No evidence whatsoever was offered at the trial to show any application of that agreement to the policy in effect in 1958. Again, at the top of page 5, of respondent's Brief, she states: "Further, petitioner's counsel, again referring to Respondent's Exhibit '7', . . . admitted in open court during the trial that he had no objection to its introduction in evidence." This was true for the reason that those earlier, cancelled policies were never shown to have any relation to the policy in effect on September 22, 1958.

From the foregoing references it is clear that respondent's counsel are *blindly assuming* that Exhibit 7 included the subject Group Insurance Policy of 1958, under which the death benefits were payable, either because they overlooked the truth that the pol-

icy in effect in 1958 *was not there,* or they deliberately shut their eyes to that fact. Whereupon they conclude, "Thus it conclusively appears from the trial record that petitioner was not thwarted nor otherwise denied due process . . . and her counsel consented to the introduction of all of respondents (9) exhibits."

In order to clear up this apparent confusion in respondent's mind, we believe it can be very simply accomplished by the present Court's examination of said Exhibit 7. In order that this Court could make such an examination at the same time that it studies these briefs, petitioner has heretofore requested the Clerk of your Supreme Court and the Clerk of the trial Court for permission to obtain and file such Exhibit 7 with this Court at this time, but has been advised by your Clerk that his office can "not request the submission of records or exhibits from any lower courts until specifically directed to do so by this court after its initial consideration . . . of a Petition for Writ of Certiorari." However, if counsel for respondent will now so stipulate with counsel for petitioner, that the Clerk of the trial Court should furnish forthwith such exhibit to the Clerk of the Supreme Court of the United States, without awaiting such a request from the Supreme Court, petitioner is advised that such exhibit will be so furnished. This would enable your Court readily to discover the truth of our position forthwith.

Respondent in her brief (pp. 2 and 3) has also argued that petitioner likewise "sought affirmative relief . . . and both offered and had received in evi-

dence proof deemed competent, relevant and material." That would appear to be immaterial to respondent's case, and her obligation to meet her own burden of proof. It was primarily respondent who was seeking to quiet her title to both halves of the death benefit at variance with the designation and division provided therefor under the policy in effect in 1958, as admitted by plaintiff's complaint. If respondent failed to meet this burden of proof, petitioner's affirmative relief was secure. There was no waiver by petitioner at the trial of the requirement that respondent meet her burden of proof by introducing the policy in effect in 1958, and show the application thereto of the Property Settlement Agreement of 1953 by proving that respondent had some community property interest in the policy in effect in 1958.

Respondent makes repeated references to the fact that petitioner, as defendant, introduced only one exhibit or bit of evidence at the trial, to wit, Defendant's Exhibit "A", which disclosed that the insurance company had accepted under an intermediary policy, the husband's "request to make the two parties beneficiaries—fifty-fifty each." (Resp. Br. p. 3.) Even this "one little tag" of evidence, as described by petitioner's counsel, was not necessary to support defendant's affirmative claim if plaintiff failed to meet her burden of proof in support of her own claim.

Neither respondent's brief nor the decision of the California District Court of Appeal made a single reference to the policy in effect on September 22, 1958, nor to the relation of that policy to either of

the cancelled policies contained in and constituting the entirety of Exhibit 7, nor to the question as to any community property interest that respondent may have had in said policy of 1958. Neither respondent's brief herein, nor the decision of said Court, ever once mentioned the words, or any question regarding, any "community property interest of respondent" (or of anybody else for that matter), either as being involved in the policy in effect in 1958 (nor for that matter in either of the cancelled policies contained in Exhibit 7, nor elsewhere).

It seems incredible that respondent could have gone through three state Courts, and have been so successful in each in ignoring these most basic and inevitable issues prerequisite to meeting respondent's required burden of proof, and never have once introduced or referred to a single word of evidence in respect thereto, and that each of these Courts in their decisions, similarly ignored them. That this disregard was not due to any silence of petitioner in respect thereto is shown under our next heading herein.

III. PETITIONER HAS CONTINUOUSLY POINTED OUT TO THE COURTS THIS TOTAL OMISSION OF ESSENTIAL EVIDENCE OF THE DEATH POLICY TO MEET RESPONDENT'S BURDEN OF PROOF.

Perhaps plaintiff (respondent herein) was as oblivious *at the trial* (as was the defendant, the petitioner herein), that Plaintiff's Exhibit 7 *never included the insurance policy* in effect on September 22, 1958, on which the death benefits hereunder were

paid, and which designated both litigants herein as equal beneficiaries thereunder. That Exhibit was introduced by plaintiff as essential to her case. That Exhibit 7 included some 60 pages, and it was only after the trial was over, that petitioner discovered that this exhibit contained only two earlier policies, the second and later of which was "cancelled and superceded" on March 12, 1956, with no evidence to indicate what were the terms and conditions of any possible superceding policy. The policy in effect on September 22, 1958 bore the same number, and, according to the complaint, made the two litigants equal beneficiaries thereof. But we know nothing more regarding its terms and conditions, its date of execution, all of the parties who were bound or affected thereby, or its relation to the prior policies, or how respondent could have retained any community property interest therein. The burden was upon respondent to prove all of these things. Not upon petitioner. It was more natural, therefore, that petitioner should have overlooked the absence of this latest policy in said Exhibit 7, than it was for plaintiff to have done so. If the policy in effect in 1958 had been included, as petitioner had at that time anticipated, she would have never objected to its admission, as she could then have sought to point out from its date, terms and conditions, that the Property Settlement Agreement of 1953 had no possible connection therewith.

Since the points and authorities filed in the trial Court, prior to judgment, were never made part of the record on appeal, the petitioner now has no opportunity to point therein to any of her arguments where

she raised this point. Her first opportunity to raise this point on appeal was in her opening brief before the California District Court of Appeal, filed October 25, 1963. (A copy of that brief is contained in the District Court's Certified Report of the records of its office, now on file in the U. S. Supreme Court Clerk's Office. See pp. 46, 47, 49-54 of that brief.) In that brief, petitioner stated as follows:

> "It is significant that even the second policy (third contract) was *not the policy* under which the insurance company paid into escrow the sum of $16,800 here in controversy. *There has been no evidence of the nature or terms of said final policy introduced herein.*" (p. 51, emphasis ours.)
>
> "The burden was upon respondent to prove the final policy under which the death benefit was paid was *precisely the same policy as that described in and affected by the Property Settlement Agreement.*" (p. 52, emphasis ours.)

Referring to Plaintiff's Exhibit 7, that brief further stated:

> "All remaining five riders . . . . were executed on or prior to May 3, 1954. *We have no evidence . . . of the policy in effect on September 22, 1958, the date of husband's death,* or how it could have been included within the description of the policy referred to in the Property Settlement Agreement of February 14, 1953." (p. 54, emphasis ours.)
>
> [Respondent] "has, throughout the trial, and in her request for a Reporter's Transcript . . . sought to bring into this case extraneous evidence to prove other intentions than those 'ascertained

from the writing alone' and contrary to the 'clear and explicit' language of the documents here involved." (p. 46.)

In the Reply Brief of Appellant (petitioner herein), (pp. 22-25, 31, 32), after the District Court of Appeal had granted respondent's motion, over appellant's opposition, to augment the record on appeal by including Hayden's oral testimony upon which that Court's subsequent decision *wholly relied*, petitioner declared:

> *"respondent's brief makes no mention of any of the terms of the new third policy, rewritten upon the cancellation of the second policy* after its declared cancellation:—'Cancelled Rewritten 3/12/56'. *Nor are the terms of the third policy in effect on September 22, 1958 ever suggested at any point in respondent's brief. . . . The third policy under which payments of death benefits were made was never introduced into evidence and its terms are unknown."* (pp. 24, 25, emphasis ours.)

> "each cancellation and execution of an entirely new policy, created a new, independent and separate contract, with new considerations, new obligations, yes, even new parties with added employers or subsidiaries of the master insured, and even changing employees in numbers, personnel and contributions." (p. 27.)

> "it could have been possible for the Husband to have [so agreed] . . . but he entered into no such agreement. . . . Respondent is trying . . . to insert such a provision into Agreement that was never there." (p. 36.)

In Appellant's Petition for Rehearing in the District Court of Appeal (pp. 7-9, 9-15, 17-20, 22, 23):

> *"Nor did it* [the District Court's Decision] *discuss therein the nature or provisions of the policy in effect when the Husband died. There was no evidence on this policy introduced by plaintiff, upon whom the burden rested."* (p. 10, emphasis ours.)
>
> "the present decision . . . concludes . . . 'The evidence shows that the same policy was in effect from 1929', clearly implying that it remained 'in effect' . . . until the Husband's death, September 22, 1958. . . . *We do not know what policy was then in effect* . . . or whether a new policy had . . . been executed during some subsequent year prior to September 1958. All we know is that the policy of 1953 was marked 'cancelled' on the back thereof." (p. 19, emphasis ours.)

In Appellant's Petition for a Hearing by the Supreme Court it was pointed out that the plaintiff's action was a suit:

> "to quiet title to a half interest in a death benefit of $16,800 paid on account of her divorced husband's death which . . . occurred *on September 22, 1958, under an annual term, employer-employee group life insurance policy,* wherein the divorced husband . . . was one of the insured employees, and wherein . . . the plaintiff herein, had been named jointly with Husband's second wife—the defendant . . . and appellant herein,—as equal beneficiaries, of $8,400 each, plus interest. . . . *These facts do not clearly or fully appear in the District Court's decision, nor the fact that the policy under which said payment was made was*

never introduced into evidence." (pp. 3, 4, emphasis ours.)

"No exhibit, stipulation or evidence was introduced as to the nature or relation of the policy which was in force at the date of death of Husband, under which the benefits were paid." (p. 8.)

In lieu of this one issue, the District Court's decision has discussed only various issues, irrelevant to this death policy, and applicable only to one or both of the two earlier cancelled policies contained in Exhibit 7. Such a false issue was especially raised by the allowance of oral testimony to override the written language of those policies, in the District Court, which testimony was incorporated into the record on appeal under respondent's motion of augmentation before that Court to include the Reporter's Transcript, granted contrary to Rule 5(f) of the California Supreme Court. These irrelevant issues no doubt caused the District Court to lose sight of the one basic issue, i.e., no evidence of the policy in effect on September 22, 1958. The Petition to the California Supreme Court again pointed out:

"No mention of these circumstances was contained in that court's opinion. In fact this aspect of the proceedings came to appellant as a complete surprise, when she received the court's opinion on November 21, 1964, since such augmentation had been denied by the lower court, and the District Court had strongly opposed the same" —(at first, and finally allowed it, conditionally).

"The District Court has, however, transformed this appeal into one involving the question of the

> right of oral testimony in negating the written language of these contracts. It has accomplished this by an unauthorized augmentation of the record on appeal by including therein the Reporter's Transcript, over appellant's objection, and relying upon the oral evidence therein, thereby raising a constitutional question under Section 13 (2nd sentence), Art. I, of the State Constitution, and the Fourteenth Amendment of the Federal Constitution." (p. 3.)

Let it not be said, therefore, that this one issue was never raised before these various state Courts as to the absence of any evidence of the policy in force at the date of husband's death, under which this death benefit was paid, and as to its relation to said Property Settlement Agreement and as to the existence of any *community property interest* assigned thereby in this latest policy.

We shall now turn to these inapplicable issues, which we call "red herring issues", since they have only served to lead these Courts away from the true issue.

IV. RED HERRING ISSUES APPLICABLE ONLY TO CANCELLED POLICIES CREATED A HOAX AS TO THEIR APPLICATION TO UNDISCLOSED TERMS OF THE DEATH POLICY.

All other issues than those applicable to the terms of the policy in force on September 22, 1958,—the death policy—are irrelevant to this entire action. Only such issues have been raised in this action. Outside of the pleadings, no evidence applicable to the death

policy exists in this action. According to the pleadings (see herebelow), the petitioner herein is one of the beneficiaries under the death policy, and since none of the evidence herein applied to that policy, the petitioner's right to her half interest thereunder has never been challenged by any evidence herein. All of the evidence introduced at the trial was directed only to the two cancelled policies contained in Exhibit 7. Not one item of evidence or presumption from evidence has ever been directed to the death policy. Without some such evidence the trial Court had no jurisdiction to award a judgment for plaintiff contrary to the admitted death policy.

The issues raised by means of this evidence actually introduced, which were directed only against those two expired policies, are far more prejudicial to petitioner than merely being irrelevant, incompetent and immaterial and therefore inadmissible. They actually misled each of the California Courts, because of the constant, *untrue, unexpressed assumption* thus implied that Exhibit 7 included the death policy,—*which it did not,* as the Exhibit clearly shows. This evidence and the issues advanced thereon thus served as "red herring", which have lured the Courts off the true trail. They, more than the absence of any evidence of this missing death policy, have created deception and a failure of due process in this action. They have created a hoax in place of the real issue in this case.

In saying this, petitioner and her counsel want it clearly understood that they are convinced that the counsel for respondent-plaintiff have at no time delib-

erately planned or foreseen this development,—any more than did the petitioner-defendant anticipate it. When the counsel for plaintiff may have first discovered that Exhibit 7 did not include the death policy we cannot say. They do not appear to have been aware of it in their last brief in opposition to the present Petition for Certiorari. They certainly had the opportunity to have discovered it before they introduced their Exhibit 7 into evidence at the trial. Their complaint was so vague regarding the terms of the death policy, and approached it in such reverse order, as to have made this oversight easy for all of us to fall into, from the very outset. However, it has now been called to their attention, and to the attention of the Courts so often throughout these appeals, as to leave little excuse for their not having discovered it long ago.

Perhaps they did discover it earlier, but felt the void could be, or was filled by parol evidence regarding this missing link. This would account for their repeated and desperate efforts to introduce at the trial more parol evidence than the trial Court would allow, and for their insistent demands for an augmentation of the record on appeal by an inclusion of the Reporter's Transcript, which defendant had purposely omitted from her appeal as she regarded this contained only incompetent evidence for construing unambiguous written contracts. This desperation of counsel for plaintiff-respondent was effectively voiced in their plea for their motion for an order of the District Court to augment the record on appeal so as to include:

"Reporter's Transcript of the oral proceedings . . . made upon the ground . . . that testimony of the material witness, Walter R. Hayden is necessary."

"that without including . . . said testimony, and all of said transcript, the reviewing court would be denied vital and determinative proof, and that reason and justice require . . . said transcript augment the record on appeal to avert a miscarriage of justice in this action." (App. Pet. for a Hearing by the Supreme Court, p. 10, made a part of the Record on this pending Petition for Certiorari.)

However, Mr. Hayden's testimony was *also directed only to the two cancelled policies* contained in Exhibit 7. Never once did Mr. Hayden refer to the undisclosed death policy. Why? Because the counsel for plaintiff-respondent only directed their questions to Exhibit 7. We must, therefore, conclude that said counsel mistakenly assumed the death policy *was* contained in Exhibit 7. In any event, their innocence produced the unfortunate effect, from petitioner's standpoint, upon the District Court, of causing that Court to believe,—reflected throughout their decision without their saying so, that the death policy was, in fact, in evidence in Exhibit 7. That Court not only thus augmented the record on appeal, but these judges accepted this oral testimony as applicable to the death policy alleged in the complaint, and was their sole basis for assuming that the death policy was in evidence, and that it was the policy referred to in the Property Settlement Agreement which thus extended

the community property interest of the divorced parties to the death policy. From there on, appellant-petitioner appealed only to unhearing ears, and in vain. It doesn't seem possible! But it did so happen. And petitioner, no doubt, contributed to this confusion by his own failure to discard all issues but this one—the non-existence of any evidence pertaining to the death policy, beyond the admissions in regard thereto in the complaint. This failure was caused, in part, because counsel for defendant had himself, at the outset, mistakenly assumed that the death policy was contained in Exhibit 7, and that these "red herring issues" might apply thereto. It had taken months of correspondence and a threat of suit, to get the insurance carrier to make available to the litigants even this incomplete copy of this voluminous Exhibit 7, which we *all* no doubt assumed contained the death policy.

What we have said about the District Court's misconception in its augmentation of the appellate record, and the acceptance of the oral opinion of Mr. Hayden as applicable to and controlling the unknown written terms of the death policy, applies equally to all of the other red-herring issues here raised. Finally, respondent did recognize, in her last brief herein (bottom p. 2), our claim "that respondent not only failed to present the most essential evidence . . . but that such alleged failure was without prior notice or warning to petitioner and without her expectation and to her utter surprise." Nevertheless, respondent here again reverts to her persistent and untenable position, that

our claim is "preposterous", because the "essential evidence"—the death policy—was, in fact, as they imply, already contained in Exhibit 7. Since that is not true, and since respondent's counsel still indicate that they do not know, even now, that it is untrue, may we ask, when and how are we entitled to sound an alarm regarding this hoax, and the misleading, deceptive effect of this untruth and the innocent misrepresentation thus made to the Courts, and our surprise in respect thereto? We have tried to sound that alarm throughout this appeal.

The citation of cases claimed to apply to the cancelled policies likewise are not here shown to be applicable to the death policy, which is not in evidence and whose terms are unknown. (Resp. Br. in Opposition, pp. 6, 7.) Counsel for respondent is wrong when he next asserts (p. 9):

> "In effect, petitioner seeks a review of this California judgment, embracing adequate and independent, State grounds."

As already stated, petitioner seeks this Writ of Certiorari, not because of any dispute as to the facts or as to California law, as applied in the California District Court's decision,—that Court's decision on its face is beyond criticism,—but we seek this writ solely upon the ground that *no evidence whatsoever exists* in this action or was introduced herein, to which the Court can refer in support of the District Court's judgment. If the District Court had realized that there existed no evidence herein as to the terms and date of origin of the death policy to which the Prop-

erty Settlement Agreement and the community interests of the parties under that Agreement could apply, it would have recognized that the trial Court was without jurisdiction to render the decision it did.

V. CONCLUSION

In conclusion, we wish again to point out how the admissions contained in the initial complaint herein regarding the death policy established petitioner's right to a judgment, and how no further allegations in the complaint were supported by any evidence at the trial, showing any connection between the death policy and any possible assignment of any community property interest applicable to the earlier cancelled policies under the Property Settlement Agreement of the parties thereto, since the death policy was never introduced into evidence.

The complaint alleged (Clk's Tr. contained in District Court's Certified Report of records of its office now on file in the U. S. Supreme Court Clerk's office):

> "Plaintiff's former husband, Francis Bernard Crombie, died on September 22, 1958, and . . . the . . . life insurance policy . . . had a value of $16,800 at the time of his death." (Par. III.) (The life insurance policy having a value of $16,800 at death was necessarily the death or "subject policy", which had not previously been mentioned in the complaint.)
>
> "That on July 24, 1959 the plaintiff and defendant, through their respective counsel, prepared and entered into a written agreement

> whereby they stipulated that said $16,800 insurance proceeds be paid . . . to California Pacific Title Insurance Company of San Francisco, as escrow holder, for the account of plaintiff and defendant . . . in a savings account . . . that a true copy of said agreement . . . is annexed hereto, incorporated by reference, as if set forth herein and marked Exhibit 'A'." (Par. V.)

That said Exhibit "A", incorporated in said complaint, provided in part as follows:

> *"the undersigned sole beneficiaries of subject policy* [Helen Faust Crombie and Gertrude Crombie, request] that the $16,800 . . . be paid by check to the joint order of Helen Faust Crombie and . . . her attorney, and Gertrude Crombie and . . . her attorney, . . . subject to said $16,800 being apportioned, divided and paid to said beneficiaries [according as] . . . a court of competent jurisdiction by final Decree, fixes and adjudicates the rights of the respective beneficiaries." (Emphasis ours.)

We respectfully submit (1) that the *total absence of any evidence* as to the terms of the death policy here involved, of any evidence of other documents claimed to be applicable thereto which would change or affect those undisclosed terms, (2) that the disastrous effect of the Court's mistaken assumption that said death policy was included in Exhibit 7, (3) that the Court's order augmenting the record on appeal to include the Reporter's Transcript, contrary to California Supreme Court Rule 5 (f), which transcript made no reference whatsoever to the death policy, and

(4) that the *total absence of any evidence* to show how the assignment of a community interest under an agreement in 1953 in respect to *then existing* and subsequently cancelled policies contained in Exhibit 7, could create a community interest in the later death policy of 1958, have all produced a failure of due process of law which should entitle petitioner to a Writ of Certiorari.

Dated, October 4, 1965.

PAUL E. SLOANE,
Attorney for Petitioner.

Office-Supreme Court, U.S.
FILED
NOV 5 1965
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 83

GERTRUDE CROMBIE, *Petitioner,*

vs.

HELEN F. CROMBIE, *Respondent.*

PETITION FOR REHEARING AFTER DENIAL OF WRIT OF CERTIORARI

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In the Supreme Court
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PETITION FOR REHEARING AFTER DENIAL OF WRIT OF CERTIORARI

THREE GROUNDS OF INTERVENING CIRCUMSTANCES OF SUBSTANTIAL OR CONTROLLING EFFECT, NOT PREVIOUSLY PRESENTED HEREIN. (RULE 58.)

1. Reply brief received herein October 7, 1965, by each Justice of the Supreme Court after the case had been presented in conference, but before its delayed consideration and decision was reached on October 11, 1965, did not allow sufficient time, due to excusable

delay by petitioner, for all of the Justices to read and jointly consider the same. (Rule 41.)

2. Absence of any evidence whatever at the trial on the prime issue deprived the trial court of jurisdiction to render an affirmative judgment, which, when rendered, denied due process of law to petitioner, according to recent decisions not previously presented. (Rule 58.)

3. The lack of public interest and the obscurity and lack of social prominence of the petitioning widow herein, while clearly justifying the Supreme Court in its discretional denial of her petition herein, may, nevertheless, appeal to this court's often recognized purpose to exercise equal consideration and protection to such a minor litigant, and thus procure for her due process of law herein.

I. EXCUSABLE CIRCUMSTANCES PREVENTING ALL THE JUSTICES OF THIS COURT FROM FULLY READING OR JOINTLY CONSIDERING PETITIONER'S REPLY BRIEF HEREIN, BEFORE DENYING SAID PETITION.

These circumstances were as follows: Petitioner's counsel received on August 23rd, a letter from the Office of the Clerk of the United States Supreme Court, stating that this "matter has been reassigned as docket No. 83, October Term, 1965", (formerly No. 1102, Oct. Term. (1964)), and that petitioner's reply brief could be filed "without requesting permission." This letter was in reply to said counsel's letter dated August 13, 1965, asking that your clerk's office make

request for submission of the exhibits in this proceeding, particularly plaintiff's Exhibit 7, from the trial court's clerk in San Francisco, as proposed by counsel's letter, in order to enable your court to examine the same, when considering the present petition for a Writ of Certiorari. Such an examination would have demonstrated the total absence of any evidence of the insurance policy under which the respondent had sought to quiet her title to the entire death benefits paid by such policy, and in which respondent claimed to have received a community property interest by virtue of a contract executed several years prior to the existence of this unintroduced policy. Your clerk replied that he had no authority to make such a request, unless directed to do so by your court. Counsel planned to seek this direction not later than the opening day of the new term, Monday, October 4, 1965,—even though he assumed it might take at least a week or more thereafter before the court could reach No. 83. He had received no information or knowledge to the contrary.

Consequently, counsel, completed his 28-page manuscript of the petitioner's reply brief including a request for Exhibit 7, by Thursday, September 30, 1965, and placed it in the hands of the printer, one of the best in the West, by noon of the next day. Counsel failed to instruct the printer to get it out by the following Saturday evening at all costs, which could have been done,—as he did not then realize its urgency. On Monday, October 4th, counsel made inquiry regarding the printing, and was told it might be several days

before the briefs would be ready. Counsel at once wrote, airmail, to the U. S. court's clerk asking his advice by telephone, collect, as to the state of the court's calendar. The clerk's telephone call was received Tuesday before noon (which was three hours later in Washington), stating that the Supreme Court was even then in formal conference and might already be considering this very petition. He agreed that the best he could do would be to deliver the briefs to the Justices as soon as he received them, which he recognized could not be then before Thursday afternoon, October 7, 1965. Counsel urged the clerk to advise the Justices of the Supreme Court at once that the briefs would be on their way the following day, Wednesday. He replied that he could not do that. The printing company was immediately alerted. They got the briefs into the mails the next day, Wednesday, before 5 p.m. Counsel was later advised by letter, from the U. S. Supreme Court Clerk, dated October 15, 1965, as follows:

> "your brief was actually received on October 7 and distributed to the Justices individually on that date. Thus, although the brief was not before them at the time of their formal conference, it was called to the attention of each Justice before the order issued, and the order could have been withheld if any of them had believed it appropriate."

This distribution to the Justices individually must have been late on Thursday afternoon, since 5 p.m. Wednesday San Francisco would be 8 p.m. Washington, and it usually requires at least sixteen hours for

a bundle of briefs to be delivered special delivery to the Clerk's office from San Francisco. With Saturday and Sunday intervening before the court denied this petition on Monday, October 11th, there was very little likelihood that any, and even less likely that all, of the Justices would have read the briefs, so as to have caused even one of the nine Justices to believe "it appropriate" to request that the order be "withheld". It was even less likely that the entire court would have had any time, during those three days to consider the brief collectively and seriously. We, therefore, believe that the petitioner should be given a further opportunity to have her Reply Brief read and considered carefully at some further "formal conference." (Rules 41 and 58.) We do hereby most earnestly urge that your court grant a rehearing for this purpose.

Counsel hereby certifies that the foregoing facts are true and correct, under penalty of perjury, over his signature at the end of this brief,—which certificate is deemed equivalent to an affidavit under the California law. (C.C.P. 2015.5.)

It is counsel's firm conviction that this reply brief, with its concentration upon this one issue, of lack of jurisdiction in the trial court, due to its *total lack of any evidence,* to sustain any affirmative judgment, without violating due process of law, represents the only brief that plaintiff,—the appellant and petitioner herein,—need have presented to each of the appellate courts involved. With such concentration, the result might have been different. Instead, this one supreme

issue in all of the other briefs, though urged, became lost in a morass of irrelevant issues, which we, (perhaps unkindly) have now designated "red herring issues." The United States Supreme Court likewise is now urged to concentrate upon this one issue, in this final reply brief, which perhaps is the only brief that this court has not yet read and has had no opportunity to consider carefully.

Even the trial court and the pre-trial court agreed that the case should be decided on the written documents alone, particularly the one policy under which the death benefits were payable, and its connection to any prior cancelled policies or agreements involving an earlier community property interest of the parties. But the trial court overlooked at the trial that the final policy had never been introduced into evidence, and that no earlier community property interest had ever been shown to have any connection with this undisclosed, unintroduced *final policy*. Plaintiff's voluminous Exhibit 7, when introduced into evidence, was erroneously assumed to contain this final policy. However, when petitioner later searched for its terms and provisions in this Exhibit 7, in order to attack the judgment, it was first discovered never to have been introduced. Neither that court nor either of the litigants know to this day what the terms and conditions of that policy are. We have already shown, in petitioner's reply brief herein, how persistently petitioner called attention to this omission. But all to no avail.

This petition for a rehearing should, therefore, be granted in order to enable this court to review and

reconsider in conference, said reply brief and to examine said Exhibit 7.

II. NEWLY PRESENTED DECISIONS THAT DUE PROCESS WAS DENIED BY THE TRIAL COURT IN ITS RENDITION OF ITS JUDGMENT IN RESPECT TO PAYMENT OF DEATH BENEFITS UNDER A POLICY WHICH WAS NEVER INTRODUCED IN EVIDENCE, WHICH WAS NEVER SHOWN TO BE SUBJECT TO ANY EARLIER COMMUNITY PROPERTY INTERESTS OF THE INSURED WITH HIS FIRST WIFE, AND WHICH ALONE COULD HAVE GIVEN THE TRIAL COURT JURISDICTION TO RENDER AN AFFIRMATIVE JUDGMENT IN THIS ACTION.

This is the sole point that petitioner sought to present in her 28-page reply brief on her petition for a Writ of Certiorari, which she now urges this court to consider fully,—since it has not heretofore had an opportunity to do so in formal conference. We have here stated this point in only six and ten lines, and now present new authorities in support thereof. Our former search and failure to find law on this point, has now been rewarded. We have necessarily drawn upon the entire field of American jurisprudence, rather than from Federal and California decisions alone. These new decisions are here presented for the first time:

> "It has been said that the definition of jurisdiction should properly include the power to render the particular judgment in the particular case, and that the mere fact that a court has jurisdiction of the subject matter of an action does not justify the exercise of a power not au-

thorized by law; . . . it is clear that every final act in the form of a judgment or decree granting relief the law declares shall not be granted is void, even when collaterally called in question." (28 Cal. Jur. 2d 615.)

Tonningsen v. Odd Fellows' Cemetery Assn. (1923) 60 C.A. 568, pp. 571, 572, 213 Pac. 710, citing:

United States v. Walker (1883) 109 U.S. 258, pp. 265-7,

where the United States Supreme Court stated (p. 266):

"Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the power granted to it by the law of its organization, its decree is void."

In *Windsor v. McVeigh* (1876) 93 U.S. 274, Justice Field stated (p. 283):

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the case, according to established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it."

"The judgment . . . cannot rest on evidence . . . which was never adduced in court, such as matters not put in evidence of which the court took judicial notice. A judgment may not rest on conjecture and speculation or on mere surmise or suspicion, nor may a judgment find support in assumptions." (49 C.J.S., Sec. 44, pp. 103, 104, Notes 46-51.)

The court in *Byrd v. Belcher* (1962, Tenn.) 203 F. Supp. 645, held that a judgment rendered in favor of plaintiff was void inasmuch as there the "court . . . could not rest a judgment . . . on anything more than mere speculation and conjecture", citing *Penn R.R. Co. v. Chamberlain* (1933) 288 U. S. 333, p. 649, 53 S. Ct. 391. Justice Sutherland in this latter cited case (p. 343) drew a distinction between whether "there is literally no evidence", and where there is not enough evidence "upon which a jury can properly proceed to find a verdict for the party producing it", citing *Pleasant v. Fant,* 22 Wall. 116, pp. 120, 121.

Where there is no evidence, the judgment is void, whereas if the evidence is merely insufficient it is voidable. The present petition involves a case where there was "literally no evidence" on the basic issue. In such a case the trial court lacks jurisdiction to make any affirmative judgment at all, on any kind of assumption, even inadvertence, that such evidence was presented. The trial court then lacks jurisdiction to make such judgment, and it proceeds without due process of law. Furthermore,

> "A void judgment is not rendered valid by mere affirmance on appeal." (29 Cal. Jur. 2d p. 138.)

The trial court cannot assume such nonexistent evidence from any private knowledge or judicial notice of his own, not legally introduced. This was so held in the following cases. This would be equivalent to the assumption by the California District Court of Appeals decision in the present action that the iden-

tity of a number given earlier cancelled policies with that borne by the unintroduced policy in effect on the date of death of the assured—September 28, 1958—proved that the terms, beneficiaries, community property interests, etc., were all identical and the same in the latter policy with the earlier ones.

In *Matthew v. Matthew* (1961, Fla.) 133 So. 2d 91, p. 97, the court held that the trial judge could not take judicial notice in support of its judgment, of evidence introduced in an earlier equity action, though involving the same facts, where a higher degree of proof was there required than in the later action at law, without again introducing the evidence, was without jurisdiction and the judgment void.

In *Hume v. Wright* (1925, Mo.) 274 S.W. 741, where the trial judge likewise took judicial notice of the record in an earlier case involving the same situation, without again taking evidence thereon, the appellate court held:

> "The court had no authority to base its findings and judgment upon any evidence without they were based on evidence offered. It was improper for the court to base its judgment on matters referred to as things of which the court took judicial notice, they not having been put in evidence", citing five other Missouri cases. (p. 744.)

In *State re Nat'l Lead Co. v. Smith* (1939, Mo.) 134 S.W.2d 1061, similar to the *Matthew* case above, involving an occupational disease in a Workman's Compensation case, the appellate court held the judgment in the later case was void and entered without jurisdiction:

"It is held that a court . . . must also have jurisdiction to render the particular judgment or order in the particular case, otherwise the judgment or order is absolutely void." (citing cases.)

"The judgment of the trial court shows on its face that the court dismissed the action without having any evidence whatever before it when the disease or injuries occurred and that action of the court was therefore absolutely void." (p. 1069.)

In *Gray v. Commonwealth* (1954, Ky.) 264 S.W.2d 69, the trial judge, upon his own private investigation or assumption compelled the defendant to go to trial for manslaughter while ill from multiple childbirth, when she could not testify coherently, resulting in her conviction. The appellate court held the judgment void, stating:

"However, in this case there was no evidence presented that appellant was physically able to stand trial." (p. 70.) . . . "While it may be that the trial judge had information from an undisclosed source that appellant was feigning illness, such information does not constitute evidence, nor would the judge be authorized to act upon such information as constituting a fact within his judicial knowledge. 'It matters not what is known to the judge if it is not known to him judicially,' is a maxim of the doctrine of judicial notice. Riley v. Wallace, 188 Ky. 471, 222 S.W. 1085, 11 A.L.R. 337. We have also held that the court must act upon evidence heard in open court and cannot make a private investigation of a matter pending before the court and then base his de-

> cision upon information obtained thereby. Stephenson v. Burton, Ky., 246 S.W. 2d 999. To hold otherwise would destroy the very purpose for which our courts are established.' " (pp. 70-71.)

In *Oldenburg v. Sears Roebuck & Co.* (1957) 152 C.A.2d 733, 741, 314 Pac.2d 33, the appellate court held:

> "A judgment cannot be based on guesses and conjectures", quoting from *Reese v. Smith,* 9 Cal. 2d 324, p. 624, etc. "Nor may a verdict be upheld 'only by resort to speculation.' *Gray v. Carter,* 100 Cal App 2d 642, 645. Substantial evidence is required to establish each essential affirmative allegation—a scintilla of evidence is not sufficient for that purpose."

Nat'l Life etc. Ins. Co. v. Kendall (1933, Ky.) 59 S.W.2d 1009, held, in reference to an accident causing death, reversing judgment, "a judgment cannot be rested on a supposition."

Roadside Rest. Inc. v. Lankershim Est. (1946) 76 C.A.2d 525, 173 Pac.2d 554, involved an inserted modification of an original sublease without any evidence as to the source or authorization for such insertion, whereupon the appellate court declared the trial court's judgment accepting such insertion as a valid part of said lease was to that extent void, stating,

> "a judgment should not rest upon probability, conjecture or vague inferences . . .; the judgment is reversed with directions to enter a judgment declaring that the original sublease without modifications . . . is the only valid and subsisting sublease." (p. 535.)

According to these decisions, and others cited by the foregoing authorities, can the following acts by the trial court herein, and the affirmation thereof by the appellate courts, be held to have given the trial court jurisdiction to have entered its judgment herein within due process of law?

1. The inadvertent act of the court in entering an affirmative judgment, allotting the death benefits to plaintiff, without any evidence whatsoever of who were the beneficiaries, or what were the terms or community property interests, or date of execution, of the insurance policy under which said benefits were paid into escrow, as giving the trial court no jurisdiction to enter said judgment, which therefore is void.

2. The unsupported assumption that the same number (according to the allegations of the complaint) appearing on the unintroduced, death-policy, as was given to prior cancelled policies, constitued proof that all such policies were identical and the same, being an assumption of facts never introduced into evidence, which failed to give the trial court jurisdiction to enter its judgment, and which therefore is void.

3. The silence of the appellate courts, without one word regarding these circumstances in their decisions, though repeatedly called to their attention, as constituting a denial of due process of law to petitioner.

III. A PLEA FOR EQUALITY OF LEGAL PROCESS AND REVIEW FOR THE OBSCURE AND WIDOWED AS FOR ANY CIVIL RIGHTIST.

Petitioner fully recognizes the unrestricted discretion and the great need of limitations, and avoidance of unjustifiable increases of responsibilities and burdens that your court must exercise in granting Writs of Certiorari, and especially a rehearing therefor, once denied. Your clerk's office kindly so advised us in its said letter of October 15th, which petitioner deeply appreciated, and fully understands, where such office stated:

> "The Court very rarely grants such petitions, and it is therefore always a serious question whether the filing of one justifies the expense and trouble involved."

Yet, we feel that the present situation is one of the most unusual and inequitable cases that is ever likely to arise, and one such as the present counsel for petitioner has never before encountered in his half century of active law practice. It has seemed inconceivable to him that due process of law can here be held to have been exercised, where a trial court has assumed jurisdiction, and rendered an affirmative judgment when it had received *no evidence whatsoever* on the first and only important issue involved—the terms and application of the policy under which insurance benefits were paid and to be divided. Even the meager, obscure allegations of the complaint to such policy are not evidence. The California District Court of Appeal in its opinion (attached to Petition for Writ of Certiorari herein), never once referred to

the particular policy in effect at the date of death of the insured, or to the absence of its introduction, or to a single term or provision thereof, nor did it once use the word "community property" as imposed upon such policy or otherwise in said decision.

Petitioner here seeks merely the recourse, to which every man is equally entitled, to due process of law before being deprived of her title in the death benefits which, on the face of the policy paying the same are hers (as indicated in the complaint). She merely here seeks the rendition to her of relief from such denial presently caused by a most unusual and inadvertent oversight and totally unsupported assumption of facts to the contrary by the trial court. This unsupported assumption was also blindly accepted by the California appellate courts without one word of comment thereon. We here seek that the petitioner be not thus deprived of her "property, without due process of law." (U. S. Const. Amends. V and XIV (1).)

Your court is our last bulwark for equal protection of the weak and obscure. Your court stands much in the position toward the American individual as does the great Providence which provides that not a sparrow "can fall to the ground against your Father's will." (Mt. 10:29.) Even as the great Plato once said: "as dear to God is the poor peasant as the mighty prince."

Is there not one of the nine Justices of your great court that is moved to give this obscure petitioner and this her final petition your serious consideration, and to ask to see said Exhibit 7, in order to discover

for yourselves that not one word of the insurance policy which is the central issue herein was ever presented before the trial court, and that its absence was never once commented on by a single word in the decisions of either of the California appellate courts herein, though called repeatedly to their attention.

Dated, San Francisco, California,
November 1, 1965.

Respectfully submitted,
PAUL E. SLOANE,
Attorney for Petitioner.

CERTIFICATION

It Is Hereby Certified that in the judgment of counsel for the petitioner said Petition is well founded and is not interposed for the purpose of delay.

PAUL E. SLOANE,
Attorney for Petitioner.